UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

Plaintiff,

-against-

09 Cr. 666 (DLC)

GARY GELMAN,

Defendant.
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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT GARY GELMAN 'S MOTION FOR RELEASE PENDING TRIAL

PRELIMINARY STATEMENT

This memorandum is submitted in support of Defendant Gary Gelman's motion for bail pending trial, pursuant to Fed.R.Crim.P. 46(a), and 18 U.S.C. § 3142. A hearing on this matter is currently scheduled before this Court on Friday, April 4. 2014, at 3:30 p.m.[1]

While nothing in this memorandum is meant to minimize the seriousness of the charges with which Mr. Gelman is charged, he nonetheless can demonstrate that he is neither a risk of flight from those charges nor a danger to the community.

This is a man with very strong family and community ties, his entire family lives in the Eastern District. His son goes to school in the community, and his beloved grandfather is buried in

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a local cemetery. His mother and grandmother, as well as many aunts, uncles and cousins all still live in the Brighton Beach area of Brooklyn, NY. It is clear that Mr. Gelman has deep-roots in this community.

This being so, he has too much to lose, and he holds too much dear – with his young family– to flee and not answer the charges against him. He has every reason to be responsible to the Court and the charges against him.

Simply put, examination of all the facts here demonstrates that Mr. Gelman is neither a risk of flight nor a danger to the community, and deserves to be released, under the appropriate conditions, to assist in the preparation of his defense.

AN OVERVIEW OF GOVERNING LAW

Bail pending trial is governed by the Bail Reform Act of 1984 ("the Act"), and particularly by 18 U.S.C. § 3142. That provision provides that the district court **shall** order the pretrial release of the Defendant, except in those instances in which the court finds there are no conditions or combination of conditions that can assure the appearance of the person as required or will ensure the safety of the community. 18 U.S.C. § 3142(b), (c), (e). *See United States v. Carswell*, 144 F.Supp.2d 123 (N.D.N.Y. 2001) ("Without question, the statute mandates release by the least restrictive means necessary to assure appearance and public safety. 18 U.S.C. § 3142(a)(1-2), (b), (c). Detention is the last alternative, and must be specifically authorized by the statute. 18 U.S.C. § 3142(a)(4)(e), (f).")

As a general matter, in determining whether there are conditions of release that will *reasonably* assure the appearance of the person and the safety of persons and the community, the court shall consider the following:

> (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;
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> (2) the weight of the evidence against the person;
>
> (3) the history and characteristics of the person, including--
>
> > (a) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drugs or alcohol, criminal history, and record concerning appearance at court proceedings;
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> > (b) whether at the time of arrest the person was on probation or on other release, pending trial, sentencing, etc:
>
> (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

18 U.S.C. § 3142(g); *see also United States v. Madoff*, 586 F.Supp.2d 240, 247 (S.D.N.Y. 2009).

Moreover, under the Act, pretrial detention may be ordered only following a hearing. 18 U.S.C. § 3142(e), (f). The **government's** right to a detention hearing, however, has been carefully limited by Congress, and exists in certain *specifically enumerated* circumstances, including when: 1) the case involves a crime of violence; 2) the case involves a *serious* risk of obstruction or attempted obstruction of justice or intimidation of a prospective witness or juror; or 3) the case involves a *serious* risk of flight. 18 U.S.C. § 3142(f); *see also United States v.*

Friedman. 837 F.2d 48, 49 (2d Cir.1988).[2] The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by **clear and convincing evidence**. 18 U.S.C. § 3142(f); *see also Madoff*, 586 F.Supp.2d at 255.

Moreover, "it is only a 'limited group of offenders' who should be denied bail pending trial." *United States v. Shakur*, 817 F.2d 189, 195 (2d Cir.1987) (quoting S.Rep. No. 98-225 at 7, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3189).

This Case Does *Not* Involve a Crime of Violence

The crimes charged against the Defendant – conspiracy to commit securities fraud, in violation of 18 U.S.C. § 371; conspiracy to commit wire fraud and mail fraud, in violation of 18 U.S.C. § 1349; securities fraud, in violation of 15 U.S.C. § 78j(b) & § 78ff; 17 C.F.R. § 240.10b-5; 18 U.S.C. § 2; and wire fraud, in violation of 18 U.S.C. § 1343 & § 2- are **not** crimes of violence, as that term is used within the Bail Reform Act. *See Madoff*, 586 F.Supp.2d at 247; *see e.g. United States v. Berkun*, 392 Fed.Appx.901 (2d Cir. 2010) (2d Cir. R. § 0.23(c)(2)) (That defendant's charge of securities fraud was not a crime involving violence was a factor weighed in favor of identifying circumstances for his release).

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[2] The other four bases for the granting of a hearing (rather than requiring bail at the outset) are (1) the case involves an offense punishable by life imprisonment or death; (2) the crime charged is a drug related offense with a maximum term of imprisonment of ten years or more; (3) the Defendant is charged with a felony after having been convicted of two or more prior qualifying offenses (*i.e.*, crimes of violence, punishable by up to life imprisonment or death, or drug related offenses punishable by incarceration of at least ten years); or (4) the case is one of gun possession. *Id.*

It is well-settled that a crime of violence must be charged against a defendant to trigger the provisions requiring a hearing under 18 U.S.C. § 3142(f)(1). Because the charges against Mr. Gelman are in no way related to a crime of violence; a Federal crime of terrorism; and it does not involve a minor victim or a controlled substance, firearm, explosive, or destructive device, a detention hearing is not justified in this matter. *See* 18 U.S.C. § 3142(f)(1)(A); 18 U.S.C. § 1591; 18 U.S.C. § 2332b(g)(5)(B).

Moreover, regarding an allegation of flight risk, if the government satisfies its burden, the court again must then decide "whether there are conditions or a combination of conditions which reasonably will assure the presence of the defendant at trial if he is released." *United States v. Shakur,* 817 F.2d 189, 195 (2d Cir.1987); *see also United States v. Mercedes,* 254 F.3d 433, 436 (2d Cir. 2001) (even in a presumption case the government bears the ultimate burden of proving risk of flight by a preponderance of the evidence).[3] Here it should be noted that the Government agrees with the Defendant's Bail package.

The Charges

As mentioned, the Defendant is charged in a four-count indictment alleging that while working as an account representative for A.R. Capital Group, Inc. (hereinafter "ARC"), he: conspired to commit securities fraud, in violation of 18 U.S.C. §371 (COUNT ONE); conspired to commit wire fraud and mail fraud, in violation of 18 U.S.C. §1349 (COUNT TWO); committed securities fraud, in violation of 15 U.S.C. §78j(b) & §78ff; 17 C.F.R. §240.10b-5; 18 U.S.C. §2

[3] In construing the words "reasonable assurance," one court has held that "[t]he law requires reasonable assurance but does not demand absolute certainty, which would be only a disguised way of *compelling* commitment in advance of judgment." *United States v. Alston,* 420 F.2d 176, 178 (D.C.Cir.1969) (emphasis added).

(COUNT THREE); and committed wire fraud, in violation of 18 U.S.C. §1343 & §2 (COUNT FOUR).

The Defendant's Criminal History

Significantly, this Defendant has no prior criminal record.

The Defendant Is Not A Danger To The Community

Though courts have construed 18 U.S.C. §3142 to find that protection of the community from economic harm is a valid objective of bail conditions, courts should approach such "invitations" to broadly construe statutes with caution. *See Madoff*, 586 F.Supp.2d at 251-52. In general, concern about future nonphysical harm to the community has been primarily considered where the charges or convictions fall under the enumerated felonies articulated in 18 U.S.C. §3142(f)(1), in particular in the context of child pornography, or drug trafficking charges. *Id* at 253.

While the government charges that Mr. Gelman has engaged in fraudulent activities in the past, it must show, by clear and convincing evidence, that there is a substantial risk he will continue to do so if released pending trial. *See id* at 252, 55. Essentially, the danger to the community argument comes down to an assertion that Mr. Gelman is likely to obstruct justice if released on bail. *See id.* Given Mr. Gelman's current personal circumstances, and ARC's cessation, that is not the case.

Mr. Gelman worked as an account representative for ARC, supervising the group's brokers and callers. *See* Complaint at ¶4. ARC was the general partner of A.R. Capital Global Fund, L.P. (hereinafter known as "Fund"). *See id.* The sole owner and President of ARC and the Fund was Mr. Alan Fishman. *See id* at ¶ 5(f). As the sole owner, Mr. Fishman had primary responsibility for the

Fund's investment decisions until February 15, 2006. *See id.* The business operations, including regular meetings with the accountant who monitored the Fund's assets went through Mr. Fishman, not Mr. Gelman. *See id.*

Furthermore, in February of 2006, Mr. Fishman sold ARC to a new owner, at which point Mr. Gelman no longer had any affiliation with ARC or the Fund. *See id* at ¶¶ 5(f), 13(a), 15. In September of 2006 both ARC and the Fund ceased operations, and it's owner disappeared. *See id* at ¶ 16.

As a **former** account representative for a capital group that ceased to exist over seven years ago, Mr. Gelman does not pose a threat of harm to the community

The Defendant Is Not A "Serious Risk Of Flight"

His surrender was voluntary – As to risk of flight, courts view a voluntary surrender in favor of the defendant's assurance to appear at future court proceedings. *See United States v. Coonan*, 826 F.2d 1180, 1186 (2d Cir. 1987); *United States v. Shakur*, 817 F.2d 189, 199 (2d Cir.1987). Mr. Gelman was on vacation in Ukraine when the complaint was filed. When Mr. Gelman initially learned of the complaint he was confused. Eventually he in turn engaged counsel to begin surrender negotiations with the government to resolve the matter. He communicated with the government for close to two years to figure out the logistics of returning to the United States. Notably, Mr. Gelman's United States passport was expired which complicated matters.

Furthermore, Mr. Gelman did not have to fear extradition from Ukraine to the United States.[4] Despite the lack of an extradition treaty, he personally travelled to the United States Embassy in Kiev in order to arrange a flight back to the United States. Although his passport was expired, Mr. Gelman obtained the necessary travel papers, and purchased a plane ticket back to the United States with his own money. Mr. Gelman through his attorney also notified the appropriate authorities to the time that his flight would land, and arranged for them to meet him upon his arrival. Mr. Gelman surrendered himself and returned to the United States voluntarily with the specific intention of resolving this matter.

Ties to the Community -- The evidence is indisputable that Mr. Gelman's ties to the community, "the starting point for assessing risk of flight", are strong. *See United States v. Gonzalez-Claudio*, 806 F.2d 334, 343 (2d Cir. 1986). His wife, son, mother, grandmother, aunts, uncles, cousins, and other family members all live in the Southern District. The Defendant is very close to his entire family, and was particularly close to his grandfather who passed away while the Defendant was in Ukraine. The Defendant's grandfather, who he was very close to for his entire life, is buried at a cemetery in Brooklyn, NY.

Mr. Gelman's entire family regularly gets together to spend time with each other. Almost every Sunday morning they have a large family breakfast. This is a very special time for everyone. Unfortunately, his mother's health has been declining, and she has found it very difficult to move around. His grandmother, who is almost 90 years old, has also experienced deteriorating health. Mr. Gelman would certainly remain with his family in order to provide the

[4] Ukraine and the United States do not have an extradition treaty.

assistance to his mother and grandmother that they require, and spend as much quality time with them as he can.

Moreover, Mr. Gelman was determined to return to the United States so he could see his 14 year-old son, who he loves dearly. The Defendant's son graduates from Junior High School in May, an event his father has always looked forward to attending. His son is active in his school's drama club, and has several plays in the near future, which are also special events that his father wishes to attend. After being separated from his son, the Defendant wants nothing more than to remain close to his son and witness as many of these significant life events as possible.

These strong family ties, especially the relationship with his young son, are very important to the Defendant – this is not a life that this Defendant would ever abandon. Simply put, the Defendant is dug in deep into his community where he has lived all his life. He has no inclination to flee.

The Potential Plea Agreement – As negotiated with the government, the possible sentence the Defendant is facing under the potential plea agreement is 46 to 57 months, hardly so lengthy a term that would induce this man to choose to become a lifelong fugitive; with of course your Honor's final determination. *(Emphasis added)*

In addition, Mr. Gelman has no history of flight, and in fact voluntarily surrendered/entered the United States specifically in order to face the charges he is accused of.

His Family And Friends Are Willing To Put Up A Significant Bail Package.

A number of family and friends have come forward to put together an overwhelming bail package to guarantee Mr. Gelman's presence in Court. They are those most dear to him – including his aunt and his friend -- who are willing to risk their most valuable assets, their homes, because they are so confident that Mr. Gelman will be responsible to his obligations to the Court. Thus, he has properties valued at over $700,000 and family and friends that will sign a $2,000,000 bond to secure his presence in Court by the below-listed properties and individuals. Those properties and the family members and friends offering them are as follows:

Rimma Khatemlyansky (Guarantor and Defendant's residence if granted bail)
3115 Brighton 6th Street
Brooklyn, NY 11235
(347) 462-9728

Mila Fishman (unencumbered property at $357,000)
40 Brighton 1st Road, Apt. 10A
Brooklyn, NY 11235

Sima Georgiev (unencumbered property at $400,000)
49A Country Drive East
Staten Island, NY 10314

Alla Cherenkova (Guarantor)
505 Elmwood Avenue, Apt. 4K
Brooklyn, NY 11230

Vera Tolpina (Guarantor)
1180 Brighton Beach Avenue, Apt. 6D
Brooklyn, NY 11235

Mira Gaft (Guarantor)
1109 Brighton Beach Avenue
Brooklyn, NY 11235

Moreover, Mr. Gelman will agree to monitoring as the Court sees fit and live with his mother at the above stated address. Assistant United States Attorney Mr. Blais has consented to the stated conditions.

Specific Proposed Bail Conditions

First, $2,000,000 personal recognizance bond secured by the signature of the six co-signers, and, two properties as described above.

That family and friends are willing to post their own, and significant, property to assure a court of a defendant's responsible nature has been recognized as a persuasive factor regarding the unlikelihood of flight. *See e.g. United States v. Carbone,* 793 F.2d 559, 561 (3d Cir. 1986) ("We are especially impressed that friends residing in Carbone's community posted one million dollars in property as surety. Although posting a property bond normally goes to the question of Defendant's appearance at trial, where the surety takes the form of residential property posted by community members the act of placing this surety is a strong indication that the private sureties are also **vouching for Defendant's character.** Although character evidence is normally presented by oral testimony, proffered evidence of this activity-community members who know the Defendant mortgage their homes to secure his release-is at least equivalent to oral character evidence.")(Emphasis supplied).

Second, surrender of Mr. Gelman's passport, plus a condition that he not apply for any new travel documents.

Third, home detention with electronic monitoring, which is that he would be confined to his mother's home, although he may leave the home for employment approved by Pretrial

Services, medical obligations, religious obligations and meetings with counsel, with notification in advance to Pretrial Services of the latter three.

Fourth, any period he is outside the home, he is not to leave SDNY and EDNY

Accordingly, given the Defendant's voluntary surrender, substantial community ties, and the significant bail package offered, he will not be a bail risk. This certainly satisfies the requirements of 18 U.S.C. § 3142.

CONCLUSION

For the reasons stated above, Gary Gelman should be released pending trial under conditions that the Court deems appropriate.

Respectfully submitted,

STRAZZULLO LAW FIRM

/s/

Salvatore Strazzullo
Attorney for Gary Gelman